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Supreme Court, U.S.
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No. 02-130

IN THE

Supreme Court of the United States

DEKALB GENETICS CORPORATION
Petitioner,

v.

BAYER CROPSCIENCE, S.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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The confusion Respondent seeks to create about the facts and rulings below cannot obscure the core elements of the Federal Circuit's decision that require this Court's review:

First, in a fraud case based on the non-disclosure of a single fact—the successful Hawaii field tests—the Federal Circuit based its "reprehensibility" determination not on the factors relating to the underlying tortious conduct set forth in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), but on the possibility that the jury found Petitioner's trial witnesses' testimony not to be credible—in the process acknowledging that its approach rendered "essentially meaningless" the *de novo* review mandated by this Court's decision in *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

Second, in a case in which "damages" were based on defendant's forfeited profits rather than injury to the plaintiff,

the Federal Circuit made no effort to ascertain the actual extent of plaintiff's injury or potential injury in determining whether the punitive award was "proportional" to such injury—instead uncritically treating the full amount of the forfeiture as an appropriate metric of harm; and

Third, in a case in which, before the complaint was ever filed, the relevant state legislature imposed a strict cap on all punitive damages awards, the Federal Circuit refused even to consider this legislative judgment in determining "comparability" because the cap was enacted after the conduct in issue.

Each of these rulings is inconsistent with decisions of this Court; the first and third are also inconsistent with decisions of other courts of appeals and are closely related to issues before this Court in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, No. 01-1289. This Court should grant certiorari to clarify the correct principles that govern due process review of punitive damages or, at a minimum, hold this petition pending its decision in *State Farm*. *See* Brief of DeKalb Genetics Corporation As *Amicus Curiae* Supporting Petitioner, Case No. 01-1289 ("*Amicus* Brief").

I. The Federal Circuit's Reprehensibility Finding Conflicts With Decisions Of This Court And Lower Federal And State Courts.

Respondent never acknowledges the Federal Circuit's concession that "the facts alleged herein do not demonstrate *any* of the criteria enhancing reprehensibility mentioned in *Gore*." Pet. App. 18a (emphasis added). Therefore, no matter how Respondent attempts to characterize the opinion below, Respondent cannot hide the necessary implication of that concession: the Federal Circuit held that factors *other* than those "mentioned in *Gore*" can enhance reprehensibility for purposes of due process review. As described in our Petition (pp. 10-12) and *Amicus* Brief (pp. 7-12), that holding threatens to undermine the very objectives of due process review: bringing some measure of reason and predictability to the imposition and measure of punitive damages. Applica-

tion of the same set of criteria across all cases offers the prospect of more consistent and less *ad hoc* results. Conversely, permitting courts' reprehensibility analyses to proceed untethered from established criteria would allow courts to stray from the common ground established in *Gore*, encourage subjective judgments by reviewing courts that would inevitably vary from case to case, and thus yield arbitrary and inconsistent results. Plenary review is therefore required.

Contrary to Respondent's claim (Opp. 12), and as the Federal Circuit apparently recognized (because it conceded no *Gore* factor was present), the facts of this case do *not* amount to "trickery and deceit" under *Gore*. *See* 517 U.S. at 576. That reference in *Gore* derives from this Court's decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993), in which the defendant engaged in a pattern of fraudulent acts, employed bogus legal documents, and intentionally commenced a frivolous legal action to obtain a set of valuable mineral rights. *Id.* at 448-50 (plurality opinion), 468-69 (Kennedy, J., concurring in the judgment). Here, as in *Gore* itself, the fraud claim turns on the nondisclosure of a single piece of commercial information and therefore, like the claim in *Gore*, does not implicate any *Gore* factors.[1]

Respondent also abandons the ground upon which the Federal Circuit rested its reprehensibility ruling, denying (Opp. 11) that "the Appellate Court 'held that the reprehensibility guidepost was satisfied . . . exclusively because the jury "may" have concluded that two of DeKalb's witnesses were not credible . . . .'" But the Federal Circuit expressly held

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[1] Notably, while Respondent professes disagreement (Opp. 1) with our assertion that this case is "based on a single incident of nondisclosure in a business dispute," Respondent itself identifies only one ground for the fraud here: DeKalb's failure to disclose the Hawaii field tests. Indeed, at trial Respondent conceded that this case did not involve an "active lie." Pet. App. 163a. Thus, as in *Gore*, the issue is only the nondisclosure of a single fact of commercial significance—not an outright falsehood or a series of falsehoods.

that when a reviewing court decides that a jury could reasonably have found a defendant's witnesses to have testified incredibly, that factor is properly considered as establishing "reprehensibility" for purposes of *Gore*'s due process review:

> It is evident that much of the determination of reprehensibility in this case turned upon an evaluation of the DeKalb witnesses alleged to have concealed the Hawaii field test results, particularly Dr. Flick. Even our review of the cold record reveals several rather implausible explanations and assertions by DeKalb witnesses. In light of this, we find that DeKalb's conduct was sufficiently reprehensible to support the award of punitive damages.

Pet. App. 18a. Respondent offers no defense of this holding. For the reasons set forth in the Petition (pp. 10-12) and *Amicus* Brief (pp. 7-12), the Federal Circuit's ruling is fundamentally inconsistent with *Gore* and, if left standing, would allow reviewing courts to find extreme reprehensibility in virtually every case.

Respondent ignores the fact that the Federal Circuit's finding of reprehensibility, in the acknowledged absence of *Gore*'s reprehensibility factors, conflicts with several lower court decisions. *See* Pet. 12-13. Of the five decisions we cited in which appellate courts reduced or vacated punitive damages awards due to the absence or weak presence of *Gore*'s reprehensibility factors, Respondent addresses only one. Even as to that one—*In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001)—Respondent's argument is unconvincing: unlike the Federal Circuit here, the Ninth Circuit in *Exxon Valdez* evaluated reprehensibility by reference to the factors mentioned in *Gore*. *Id.* at 1241-43.[2]

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[2] As the Petition noted (pp. 13-14), the Federal Circuit's analysis also conflicts with the decisions of several federal courts of appeal and state supreme courts over the reprehensibility of a defendant's conduct for torts committed in the business setting. Respondent argues (Opp. 14) that none of these cases involved intentional fraud "in a close research

Equally unavailing is Respondent's defense (Opp. 9-11) of the standard of review applied by the Federal Circuit. Though *Cooper Industries* unequivocally required that courts review the *entire* "excessiveness" determination *de novo*, 532 U.S. at 441, the Federal Circuit held that *Cooper*'s mandate was "essentially meaningless" where, as in this case, the reprehensibility determination constituted jury evaluations of witnesses' credibility. Pet. App. 16a. Respondent's justification for this "meaningless" review (Opp. 11)—the commonplace proposition that findings of fact are binding on appellate courts—confuses findings of fact with legal determinations about whether particular findings establish sufficient reprehensibility as a matter of constitutional law. Of course the Seventh Amendment mandates that where a jury has found facts relating to the defendant's conduct, those findings bind the court if they are not clearly erroneous. *See Cooper Industries*, 532 U.S. at 437. But once that conduct is found to establish liability, the appropriate level of punitive damages is a legal judgment, not a factual one, *id.* at 437 n.11, and "reprehensibility" is a legal conclusion based upon facts, not itself a fact as to which the jury's finding is owed deference. Where a jury has found certain facts, therefore, a reviewing court still must decide for itself whether the facts demonstrate high reprehensibility so as to justify a high punitive award. Unlike other courts of appeals—which independently analyze the reprehensibility of a defendant's conduct without deference to the jury's findings (*see* Pet.

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collaboration." But nothing in those decisions suggests that reprehensibility turned on the nature of the collaboration. And the cases upon which Respondent affirmatively relies are inapposite. *TXO* involved a completely different set of circumstances and a much lower punitive damages award, *see supra* at p. 3; in *Tronzo* v. *Biomet, Inc.*, 236 F.3d 1342, 1349 (Fed. Cir.), *cert. denied*, 122 S. Ct. 580 (2001), the defendant waived any excessiveness challenge; and *Guzman* v. *Tower Development Inc.*, No. 96-17232, 1997 WL 801449 (9th Cir. Dec. 19, 1997) is an unpublished decision with no precedential value, *see* 9th Cir. R. 36-3(a).

14)—the Federal Circuit failed to make this determination. Pet. App. 18a.[3]

II. The Federal Circuit's Proportionality Analysis Is Inconsistent With This Court's Decisions.

This Court has never squarely addressed the important question whether equitable remedies such as disgorgement of profits that do not measure "harm" properly may be considered within *Gore*'s proportionality guidepost. But, as our Petition explains (pp. 15-18), the Federal Circuit's resolution of that question conflicts with the reasoning of both *Gore* and *Cooper Industries*.[4]

Respondent misleads the Court when it claims (Opp. 18) that "the District Court determined . . . that $15 million . . . constituted [Respondent]'s harm," and "[t]he Federal Circuit

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[3] Of the three decisions cited in our Petition (p. 14), Respondent addresses only one, *Zimmerman* v. *Direct Federal Credit Union*, 262 F.3d 70 (1st Cir. 2001). In that case, however, unlike the Federal Circuit here, the First Circuit correctly read *Cooper Industries* to require appellate courts to take a "fresh look" at the size of the award in light of the facts of the case, *id.* at 81, and to conduct the reprehensibility analysis "without deference to the trial court's appraisal," *id.* at 82.

[4] Contrary to Respondent's suggestion (Opp. 19), *Cooper Industries* did not treat "unjust enrichment awards as a proper basis for comparison of excessiveness of the punitive damages award." The plaintiff in *Cooper Industries* was awarded $50,000 in *compensatory* damages, 532 U.S. at 426, and the Ninth Circuit viewed *that* as the proper basis for comparison, *Leatherman Tool Group, Inc.* v. *Cooper Industries, Inc.*, 285 F.3d 1146, 1150 (9th Cir. 2002). Both this Court and the Ninth Circuit *rejected* unjust enrichment as a measure of harm for due process purposes.

None of the authorities Respondent cites (Opp. 19-20) holds that disgorgement of a defendant's profits necessarily equals a plaintiff's harm. Indeed, those authorities either are entirely inapposite or, in fact, support our position (Pet. 15-18) that a defendant's profits should not be equated *ipso facto* with "harm." For example, *Tull* v. *United States*, 481 U.S. 412, 424 (1987), considered neither punitive damages generally nor the specific issue of the punitive nature of a disgorgement remedy; yet the Court characterized disgorgement of improper profits as a "limited form of penalty." *Id.*

agreed." In fact, the district court (1) frankly acknowledged that the $15 million award "is based upon DeKalb's illicit gains—*not damage to [Respondent]*," Pet. App. 137a (emphasis added); (2) referred to the recovery of profits in excess of harm contemplated by an award of unjust enrichment as a "windfall" to the plaintiff, Pet. App. 140a; and (3) made clear that its instructions directed the jury "to award [Respondent] all of the profits attributable to the unjustly retained benefit," Pet. App. 141a, *not* compensation for Respondent's injury. The Federal Circuit certainly understood that the $15 million did *not* "constitute[] [Respondent]'s harm" (Opp. 18): the most that court asserted was that the award "*relates* to the bad actions of DeKalb and resultant harm to [Respondent]," and "is logically *related* to the harm or potential harm caused [Respondent]." Pet. App. 21a (emphasis added). But just as in *Cooper Industries*, 532 U.S. at 441-42, this general assertion of some undefined *relationship* to harm is not enough (*see also Gore*, 517 U.S. at 581); it is obvious that to ascertain whether the punitive damages are proportional to the plaintiff's injury, the reviewing court must determine the actual extent of the injury. Uncritical reliance on a forfeiture of the defendant's profits to constitute injury threatens to include punitive elements of the forfeiture as harm, and thereby to grossly understate the actual ratio of punishment to harm. *See* Pet. 17-18. That was likely the case here: the only "harm" suffered by Respondent was its decision to accept a lump-sum payment and forego the opportunity to receive future royalties on the corn products developed by DeKalb and Monsanto, and Respondent can point to nothing in the record suggesting that this opportunity had a value remotely approximating $15 million.[5]

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[5] Respondent's suggestion (Opp. 17) that its potential harm rose to the level of $500 million is preposterous. Neither the court of appeals nor the district court ever so much as attempted to determine the extent of Respondent's potential injury (as distinguished from DeKalb's potential profits). *See* Opp. App. 3a-4a.

By including all of DeKalb's disgorged profits in its proportionality calculation, without even attempting to ascertain Respondent's actual or potential injury, the Federal Circuit's decision conflicts with the reasoning of both *Gore* and *Cooper Industries*.

III. The Federal Circuit's Comparability Analysis Is Inconsistent With Decisions Of This Court And Lower Federal Courts.

Essentially restating the analysis of the Federal Circuit without confronting its defects, Respondents argue (Opp. 20-26) that later-enacted statutes like North Carolina's punitive damages cap are irrelevant for "comparability" purposes because they could not have given "notice" at the time of the tortious conduct. That approach ignores entirely *Gore*'s admonition that the central function of comparability review is *not* notice but "'accord[ing] "substantial deference" to legislative judgments concerning appropriate sanctions . . . .'" 517 U.S. at 583 (quoting *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., dissenting)). While a strict "notice"-based approach such as the Federal Circuit's affords no consideration whatsoever to the legislative judgment about punishment and deterrence reflected in after-enacted laws—or to the judgment of other state policy-makers reflected in later application of those laws by a State's executive or judicial branches—the "deference"-based approach articulated in *Gore* requires consideration of such judgments. Thus, as explained in our Petition (pp. 19-20), the Federal Circuit's holding on this point cannot be squared with *Gore* itself, which specifically considered after-enacted statutes. 517 U.S. at 584 n.40. It also cannot be squared with the rulings of other courts of appeals that have considered after-enacted statutes, *In re Exxon Valdez*, 270 F.3d 1215, 1245 (9th Cir. 2001),[6] post-conduct executive actions, *Johansen* v. *Combus-*

[6] Respondent concedes that in *Exxon Valdez* the Ninth Circuit "examined a statute enacted after the tortious conduct in question" (Opp. 24);

tion Eng'g, Inc., 170 F.3d 1320, 1337-38 (11th Cir. 1999), or judicial actions, *Leatherman Tool Group, Inc.* v. *Cooper Industries, Inc.*, 285 F.3d 1146, 1149 (9th Cir. 2002); *Zimmerman* v. *Direct Fed. Credit Union*, 262 F.3d 70, 84 (1st Cir. 2001).[7] Like the North Carolina punitive damages cap in this case, the policy judgments reflected in those subsequent official actions could not have provided notice, but did reflect state policy concerning the appropriate level of punishment. *See generally Amicus* Brief at 13-15. If Respondent and the Federal Circuit are right, then those cases were wrongly decided—and vice versa. Review is needed to resolve that issue.

IV. This Court Should Grant The Petition To Consider The Unique Issues Presented By This Case Or, At A Minimum, Hold The Petition Pending Decision In *State Farm.*

We agree with Respondent that this Petition raises issues that are distinct from those the Court will address in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, No. 01-1289. That is why we urge the Court to grant plenary review in this case.

Respondent attempts to distinguish the case on the basis that the statute was specifically enacted with regard to the underlying accident. The Ninth Circuit's reasoning, however, did not turn on that fact but rather on its conclusion that the after-enacted statute had "value as a legislative judgment . . . of what amount of punishment serves the public interest in deterring and punishing, but not overdeterring, the conduct." 270 F.3d at 1246. That is precisely the conclusion the Federal Circuit *refused* to countenance.

[7] Respondent admits that in *Johansen* the Eleventh Circuit treated as relevant the fine subsequently imposed for the defendant's conduct, reasoning that the fine "could be viewed as an indication of the legislative judgment for the specific conduct" (Opp. 24 (citation and internal quotation marks omitted)). Similarly, the First Circuit in *Zimmerman*, 262 F.3d at 84, and the Ninth Circuit in *Leatherman*, 285 F.3d at 1149, considered decisional law handed down after the underlying tortious conduct.

Respondent is simply wrong, however, to argue (Opp. 26-28) that this Petition shares no common issues with *State Farm*. We explained in a brief *amicus curiae* in *State Farm* how a holding by this Court that the Utah Supreme Court misapplied *Gore*'s reprehensibility guidepost or *Gore*'s comparability guidepost would warrant vacatur and remand of the Federal Circuit's decision. *See also* Brief of Certain Leading Business Corporations as *Amici Curiae* In Support of Petitioner, No. 01-1289, at 27-28 (highlighting errors common to the Utah Supreme Court's and the Federal Circuit's reprehensibility analyses). Respondent submits (Opp. 27) that the two cases do not present common reprehensibility issues because "the *Gore* [reprehensibility] factors are not mutually exclusive" and "the facts giving rise to reprehensible behavior are limitless." Unsurprisingly, Respondent cites no authority for this proposition: *Gore* reached precisely the opposite conclusion. *See* 517 U.S. at 575 (explaining that the reprehensibility guidepost is rooted in "the accepted view that some wrongs are more blameworthy than others"). If the Court reaffirms in *State Farm* that the *Gore* factors are exclusive or, alternatively, are limited to characteristics of the tortious conduct giving rise to the punitive damages award, then, in the absence of plenary review in this case, the Court should vacate the Federal Circuit's decision and remand the case. *See Amicus* Brief at 7-12. Thus, at a minimum, the Court should hold this Petition pending its decision in *State Farm*.

Respectfully submitted,

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